THE WHITE HOUSE

WASHINGTON

PRESIDENT'S INTELLIGENCE OVERSIGHT BOARD

November 16, 1982

Dear John Mr. McMahon:

This afternoon I provided you with a draft--complete with penned-in corrections--of a letter I hastily prepared this morning which I thought might help you understand my position in the controversy over reporting to the PIOB under E.O. 12334.

Since I thought you might wish to circulate or retain the letter for your records, I am enclosing a corrected copy. I would be grateful if you would substitute it for the original I provided you earlier today, if that has not already been destroyed. Thanks.

With best wishes, I am

Sincerely,

Robert F. Turner
Counsel

Mr. John McMahon
Deputy Director of Central Intelligence
Central Intelligence Agency
Washington, D. C. 20505

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November 16, 1982

Dear ~~Mr. McMahon~~ John:

I deeply appreciate your willingness to take time from your busy schedule to see me yesterday on such short notice. I thought it might be helpful if I summarized where we stand at this point, and to reaffirm my hope that this can be resolved without the Board having to raise it with the President or Judge Clark. If you wish you may treat this as a personal, unofficial communication which need not be made a part of any official record. It has not been reviewed by the Board.

To begin with, I would again stress that the Board has no desire to inhibit the DCI's statutory obligation to protect intelligence sources and methods from unauthorized disclosure. On the contrary, we recognize the tremendous damage that can result from such disclosures, and we encourage you to give that obligation your utmost attention.

I also share your view, given the limited experience of the past year or so, that it is highly unlikely that the Agency will engage in any intelligence activity which would require the Board to be given sensitive information about sources and methods. Even should an unlawful activity occur it would not normally be necessary for the Agency to disclose the name of an agent or other similarly sensitive details. Indeed, I can not at the moment conceive of a hypothetical which would require such disclosure.

However, by order of the President of the United States, Senior Officials of the Intelligence Community--including the Director of the Central Intelligence Agency--are required to: "Report to the Intelligence Oversight Board . . . concerning any intelligence activities of their organizations that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive." (Executive Order 12333 (Dec. 1981), section 1.7(d).) Mr. Sporkin's contention that, because it also requires that the DCI be kept "appropriately informed," this provision does not apply to the CIA is an insult to the Board's intelligence and is beneath the dignity of your fine organization. We believe this requirement to have been expressly recognized by DCI Casey in his letter to the Board dated 27 August 1982, but if in reality there is

any confusion at your end this is something we need to resolve promptly. Unless I hear otherwise from you or Mr. Sporkin, I will assume that you do not believe the CIA to be immune from the constraints of section 1.7 of E.O. 12333.

As you know, a similar reporting requirement is imposed upon agency General Counsel and Inspectors General in section 4 of E.O. 12334 (Dec. 1981), which provides in part that they shall "to the extent permitted by law, report to the Board concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive." Because the language "to the extent permitted by law" was in the Board's view subject to possible misinterpretation, once we had established that it was not inserted to permit withholding information because the Board was not yet cleared for a particular classified activity or compartmented program I was instructed to communicate this fact to General Counsel within the Community. To insure that our interpretation was proper, my letter of 3 August 1982 had the concurrence (and in some instances reflected changes recommended by) the Counsel to the President, the General Counsel to the NSC, and the Counsel for Intelligence Policy and Review at the Department of Justice.

As a matter of law, should the unlikely situation arise in which the CIA is unable to comply with the President's order to report certain activities to the PIOB without disclosing sensitive sources and methods, you would not be exempted from that requirement by the provision embodied in section 102(d)(3) of the National Security Act of 1947, giving the DCI responsibility for "protecting intelligence sources and methods from unauthorized disclosure . . . ." [Emphasis added.] A disclosure which is ordered by the President can hardly be characterized as "unauthorized."

Nevertheless, the Board recognizes the possibility that a situation might arise in which the DCI would conclude that an activity was so extremely sensitive that its disclosure to anyone other than himself, the President, and perhaps the Attorney General would risk irreparable harm to the national security. In that event, we recognize the right of the Director to raise the issue directly with the President and to seek presidential authority to conceal all or part of the activity from the Board's oversight. This should allow you to protect your most sensitive sources and methods without in the process violating the President's orders.

As I understand Stan's most recent position, he alleges that should compliance with E.O. 12334 require the disclosure of sources and methods to the Board, the National Security Act prohibits such compliance. We disagree. As a concession, Stan is willing to notify the Board in the event the DCI decides not to comply with the Order. That essentially

unilaterally cuts the Board out of the picture at the discretion of the DCI. At best, we could only notify the President that there might be a problem but that we were incapable of carrying out the task assigned to us. The burden of investigating further would then fall directly on the President. We would not serve our client well to agree to such an arrangement.

As a practical matter, you can be assured that any report from the DCI to the effect that the Board was being excluded from overseeing a possibly illegal activity would be taken immediately and directly to the President. Under Mr. Sporkin's approach, the President would then have to take time from his busy schedule to call in the key people and investigate further. Since the President would become directly involved in any such activity anyway, and since having the DCI raise the issue directly would be more convenient and waste less of the President's valuable time, we fail to understand Mr. Sporkin's insistance on his procedure. It is not unreasonable to expect that when the President of the United States orders an Executive Branch employee to take a certain action, that action will be taken unless the President approves a departure from his original order.

When I spoke with you yesterday afternoon, I indicated that I would consider it most unfortunate if we were unable to resolve this dispute among ourselves and it had to be taken to the President or his Assistant for National Security Affairs for final resolution. Both the President and Judge Clark have far more important matters to occupy their limited time. At the same time, should the issue be brought to them I am quite confident of the final decision. The President's Counsel, the NSC General Counsel, and the appropriate people at the Justice Department are fully in agreement with the Board's position.

Upon my return to the White House last evening I discussed the matter with the one Board member who had not yet had an opportunity to react to Mr. Sporkin's most recent letter. (The other two members had already agreed it was completely unacceptable and if necessary should be raised at a higher level for resolution.) The third member, who is a very distinguished attorney and for many years was Dean of one of this nation's most prestigious law schools, responded simply: "Let's take it to the President." Given that reaction, I am confident that the matter will be brought to the attention of Judge Clark and/or the President--and perhaps as early as later this week--unless you or Mr. Sporkin agree to comply with the Order.

John, I think it is fair to say that no one in the professional intelligence community is held in higher personal esteem by the Board than yourself. Certainly that is my own view. I

deeply regret that this matter has put us at odds, and I remain hopeful that we will be able to resolve it without having to bother the President or his senior staff. Although time is running out, I remain available to talk with you at any time and place of your choosing if you believe it might be helpful.

With deep respect and best wishes, I am

Sincerely,

Bob

Robert F. Turner
Counsel

Mr. John McMahon
Deputy Director of Central Intelligence
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Washington, D. C. 20505